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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

RODNEY GENE BEELER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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26 pp.

(CAPITAL CASE)

QUESTION PRESENTED

Whether the one-year period of limitation for filing an application for writ of habeas corpus, mandated by section 101 of the Antiterrorism and Effective Death Penalty Act of 1996, is a jurisdictional prerequisite to habeas review which cannot be extended under a theory of equitable tolling.

LIST OF PARTIES

Arthur Calderon, Warden, California State Prison at San Quentin, is the Petitioner in this Petition for Writ of Certiorari.

United States Court of Appeals for the Ninth Circuit issues a published opinion on April 17, 1997, amended on October 29, 1997, whic is the subject of this request for review.

Rodney Gene Beeler, an inmate sentenced to death under the law of California, is the Respondent in this proceeding.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No.

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

RODNEY GENE BEELER, *Respondent*.

Petitioner Arthur Calderon, Warden of the California State Prison at San Quentin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

CITATION OF REPORTS OF OPINIONS AND ORDERS

People v. Rodney Gene Beeler, 9 Cal. 4th 953, 39 Cal. Rptr. 2d 607; 891 P.2d 153 (1995), a published Opinion by the California State Supreme Court affirming Beeler's judgment of conviction and death sentence. A copy appears at Appendix 1.

Rodney Gene Beeler v. Arthur Calderon, Case No. CV-96-0606-RT, filed February 28, 1997, an unpublished Order by the United States District Court for the Central District of California, granting Beeler's motion to extend the filing date for the petition for writ of habeas corpus and ruling that the one-year time limit for filing a petition for writ of habeas corpus could be equitably tolled. A copy appears at Appendix 2.

Arthur Calderon v. United States District Court (Beeler), 112 F.3d 386 (9th Cir. 1997), Case No. 97-70277, filed April 17, 1997, amended on October 29, 1997, following denial of rehearing and rejection of suggestion for rehearing en banc, a published Opinion by the United States Court of Appeals for the Ninth Circuit denying Petitioner Calderon's Petition for Writ of Mandate to the United States District Court for Central District of California, to set aside the ruling that the one-year time limit for filing a petition for writ of habeas corpus was subject to equitable tolling. A copy appears at Appendix 3.

In re Arthur Calderon, Case No. 96-1683, filed June 23, 1997, Order by the Supreme Court of the United States, denying Petitioner Calderon's Petition for Writ of Mandate to the Ninth Circuit Court of Appeals and the United States District Court for the Central District of California, to set aside the ruling that the one-year time limit for filing a petition for writ of habeas corpus was subject to equitable tolling. A copy appears at Appendix 4.

STATEMENT OF JURISDICTION

The ruling of the United States Court of Appeals for the Ninth Circuit was entered on April 17, 1997. On October 29, 1997, the Court of Appeals denied a petition for rehearing and suggestion for rehearing en banc and issued an amended opinion. The jurisdiction of this Court is invoked under Title 28 of United States Code section 1254(1).

RELEVANT STATUTES

Section 101 of the Antiterrorism and Effective Death Penalty Act of 1996, appearing in Chapter 153 of Title 28 of United States Code section 2244, provides in relevant part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent

judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

On June 14, 1988, Rodney Gene Beeler[1/] was found guilty following a jury trial in the state court for the December 30, 1985, murder of Anthony Stevens. (IV CT 1450-1451.) On May 5, 1989, the state court sentenced Beeler to death. (V CT 1800-1804.) On April 10, 1995, the California Supreme Court affirmed Beeler's conviction and sentence following his automatic direct appeal. People v. Beeler, 9 Cal. 4th 953, 39 Cal. Rptr. 2d 607, 891 P.2d 153 (1995). On November 15, 1995, the California Supreme Court denied Beeler's state Petition for Writ of Habeas Corpus. On January 8, 1996, this Court denied Beeler's Petition for Writ of Certiorari. Beeler v. California, ___ U.S. ___, 116 S. Ct. 723, 133 L. Ed. 2d 675 (1996).

Thereafter, Beeler indicated his intent to seek collateral review in the federal courts under Title 28 of United States Code section 2241. On September 27, 1996, the District Court for the Central District of California (hereafter, "District Court"), issued an order directing Beeler to file his petition for writ of habeas corpus by March 25, 1997.

On or about January 31, 1997, Beeler filed a motion to extend the time to file his Petition for Writ of Habeas Corpus in the District Court and to equitably toll

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1. Rodney Gene Beeler is the Petitioner for a Writ of Habeas Corpus underlying this Petition for Writ of Certiorari. In the interest of clarity, the Petitioner for this Petition for Writ of Certiorari will be referred to as "Petitioner Calderon." Rodney Gene Beeler will be referred to as "Beeler."

the one-year filing period because one of his originally appointed counsel left for other employment and was replaced by another attorney. On February 28, 1997, the District Court issued an order, equitably tolling the period of limitation for filing the petition for writ of habeas corpus, and granting Beeler's motion to extend the filing date for his petition for an additional 202 days to October 13, 1997.

On March 24, 1997, Petitioner Calderon filed a Petition for Writ of Mandate in the United States Court of Appeals for the Ninth Circuit (hereafter, "Ninth Circuit") requesting direction to the District Court to set aside its ruling finding that the one-year period of limitation was a statute of limitation that could be extended by equitable tolling. On April 17, 1997, the Ninth Circuit denied the petition in a published opinion, holding that the time limit was not a jurisdictional prerequisite, but a statute of limitation subject to equitable tolling. Arthur Calderon v. United States District Court (Beeler), 112 F.3d 386 (9th Cir. 1997).

On April 21, 1997, Petitioner Calderon filed a Petition for Writ of Mandate and a Motion for Expedited Review in this Court, contesting the Ninth Circuit's ruling permitting equitable tolling. Expedited review was denied. On June 23, 1997, this Court denied the Petition for Writ of Mandate. In re Calderon, Case No. 96-1683, filed June 23, 1997.

On April 21, 1997, Beeler filed a Petition for Rehearing and Suggestion for Rehearing En Banc in the Ninth Circuit, contesting the Ninth Circuit's ruling that his case came under the provisions of the Antiterrorism and Effective Death Penalty Act because his application for writ of habeas corpus had not yet been filed. On October 29, 1997, the Ninth Circuit denied rehearing and rehearing en banc, but issued an amended opinion. The amendment did not affect the court's ruling that the limitation period was amenable to equitable tolling. Arthur Calderon v.

United States District Court (Beeler), 112 F.3d 386 (9th Cir. 1997) (originally filed April 17, 1997, amended October 29, 1997, Case No. 97-70277).

On October 10, 1997, Beeler filed his Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California, Case No. CV-96-0606-RT, along with a motion for leave to amend that petition in the future. Also on October 10, 1997, Beeler filed a Petition for Writ of Habeas Corpus in the Supreme Court for the State of California, raising claims that had not been raised previously in the state courts. California State Supreme Court No. S065016. On November 12, 1997, the District Court denied Beeler's motion for future amendment of the petition on the ground it was premature.

REASONS FOR GRANTING THE WRIT

This is a case of first impression to decide whether the time period for filing a federal habeas corpus petition under the Antiterrorism and Effective Death Penalty Act of 1996 is jurisdictional in nature, or merely directory, subject to extension by equitable tolling. The nature of the period of limitation is a matter of compelling importance that has not been, but should be, settled by this Court. U.S. Sup. Ct. R. 10.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter, "AEDPA" or "Act") was signed into law. Section 101 of the AEDPA established a one-year period of limitation for filing a petition for writ of habeas corpus. Section 101 has been codified in Chapter 153 of Title 28 of United States Code section 2244(d).[2] The Ninth Circuit has ruled that the

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2. Beeler's case, a capital case, is controlled by Chapter 153, and not Chapter 154 of Title 28 of United States Code (28 U.S.C. §§

one-year period of limitations is not jurisdictional in nature, but instead a statute of limitations subject to extension by means of equitable tolling. Under this ruling, petitioners like Beeler seeking collateral review in the federal courts are able to receive discretionary grants of equitable tolling of the filing period.

Petitioner Calderon contends that the one-year period of limitation for filing a habeas petition is jurisdictional in nature, comparable to the jurisdictional deadline for filing a notice of appeal. Cf. Fed. R. App. P., rule 3(a); Smith v. Barry, 502 U.S. 244, 245, 247-248, 249, 112 S. Ct. 678, 116 L. Ed. 2d 678, 683, 686 (1992); Report of the United States Senate Committee on the Judiciary on S. 1763, S. Rep. No. 98-266, 9/12/83, p. 9 [noting the need for a time limit for filing a habeas petition, as is required for filing, et al, an appeal notice (Fed.R. App. P., rule 4(b)].

A. The Habeas Process Must Begin With A Jurisdictional Period Of Limitation In Order To Effectuate Congress's Intent To End The Excessive Delays

The AEDPA represents an extensively-debated response to an abiding public outrage over endless delays in habeas corpus litigation. The purpose of the habeas reform found in the AEDPA was "to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." U.S.C. Cong. & Admn. News, 104th Cong. 2d Sess. at 944 (1996) (House Conf. Rpt. 104-518 at 111). The amendment to section 2244 was the culmination of a reform effort that began with the Reform of Federal

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2261-2266 [special habeas corpus procedures in capital cases from qualifying states]). See, Ashmus v. Calderon, 123 F.3d 1199 (9th Cir. 1997), cert. granted, 12/5/97, Calderon v. Ashmus, Case No. 97-391.

Intervention in State Proceedings Act of 1983 and continued for over a decade until AEDPA became law. Report of the United States Senate Committee on the Judiciary on S. 1763, S. Rep. No. 98-266, 9/12/83. See also, Lonchar v. Thomas, ___ U.S. ___, 116 S. Ct. 1293, 1313, 134 L. Ed. 2d 440 (1996) Appendix [listing the bills concerning the period of limitation].

The purpose of the AEDPA cannot be accomplished when the very inception of federal collateral review is subject to indefinite delay. In federal appeals, the filing of the notice of appeal is a jurisdictional prerequisite. Fed. R. App. P., rule 3(a). If the filing period for appeals is jurisdictional in nature, it should be all the more so for federal habeas proceedings, which is not direct review, but collateral review of a case already fully litigated and reviewed in the state courts. See, Lindh v. Murphy, ___ U.S. ___, 117 S. Ct. 2059, 138 L. Ed. 2d 481, 497-498 (1997) [Rehnquist, C. J., dissenting]. In Barefoot v. Estelle, 463 U.S. 880, 887-888, 103 S. Ct. 3383, 3392, 77 L. Ed. 2d 1090 (1983), this Court noted:

> When the process of direct review -- which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is *secondary and limited*. . . .

Emphasis added.

This limited and secondary nature of federal habeas collateral review makes it that much more imperative to establish stringent control over the proceedings from the very beginning, requiring a prospective petitioner to strictly observe jurisdictional

filing deadlines. Even a strict guideline for the exercise of discretion eviscerates the gatekeeping function of the period of limitation. To be an effective gate, the period of limitation must be absolute and definitive of jurisdiction. Nothing must be permitted to obscure or evade its purpose, either before or after the filing of the habeas application. Allowing any judicial discretion to extend the filing time opens the door to unpredictable and uneven treatment.

> As Selden pointed out so many years ago, the alternative [to a precise rule] is to use each equity chancellor's conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor's foot. [Citation.]

Lonchar v. Thomas, 116 S. Ct. at 1298.

Where there are no explicit and definitive guidelines for the courts in jurisdictional matters, there is the opportunity for unpredictable, uneven, and inevitably arbitrary treatment, even within a single case. In Thompson v. Calderon, a case now pending before this Court, a much-divided Ninth Circuit reopened an "eleventh-hour" capital case and recalled the mandate, which had reinstated the death penalty judgment, after time for rehearing and for calling en banc review expired. Thompson v. Calderon, Orders filed 7/28/97, 7/30/97, and 8/3/97, amended 8/8, 12, and 20/97, by the United States Court of Appeals for the Ninth Circuit, Case Nos. 95-99014, 95-99015, cert. granted, United States Supreme Court Case No. 97-215. Only when clear and definitive jurisdictional standards are established can such disorder and uncertainty be stopped.

The Ninth Circuit acknowledged Congress's intent to accelerate the habeas process, opining that

although a statute of limitation subject to equitable tolling would not serve Congress's goal as well as a strict jurisdictional bar, it would still speed up the process. The Ninth Circuit also created a strict standard for granting equitable tolling:

> Equitable tolling will not be available in most cases, as extensions of time will only be granted if "extraordinary circumstances" beyond a prisoner's control make it impossible to file a petition on time. [Citation.] We have no doubt that district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted.

(Arthur Calderon v. United States District Court (Beeler), 112 F.3d 386, 391 (9th Cir. 1997), as amended October 29, 1997; App. 3 at 130-131.)

Already the discretionary guideline created by the Ninth Circuit in Beeler's case has opened the door for uncertainty and indefiniteness with respect to the time to file a habeas application. Despite the Ninth's Circuit assurance that it had "no doubt that district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted," the district courts have equitably tolled the filing period in numerous capital cases.[3]

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3. See e.g., Ashmus v. Calderon, No. C-93-0594-TEH, United States District Court for the Northern District of California ["USDS-ND"], Order filed 4/24/97; Bacigalupo v. Calderon, No. C-94-2761-DLJ, USDC-ND, Order filed 4/21/97; Freeman v. Calderon, No. 95-3368-FMS, USDC-ND, Order filed 4/23/97; Mitcham v. Calderon,

While the courts may acknowledge the Ninth Circuit's high standard for equitable tolling, in actual practice no standard exists. In Sheldon v. Calderon, Case No. CV-96-5545-TJH, the District Court has so far already issued three grants of equitable tolling to allow time for appointment of counsel and funding (neither of which is required under Chapter 153), and for litigating the issue of exhaustion. See, Orders issued on 6/11/97, 8/26/97, and 11/12/97, United States District Court for the Central District of California. In Ashmus v. Calderon, C-93-0594-TEH, the District Court tolled the filing period for 45 days after the petition had been filed to have the parties litigate the issue of exhaustion, and to allow the inmate to file a petition for exhaustion in the state court. The tolling was granted even though the court noted that the inmate had been on notice since April 24, 1996, when the AEDPA was enacted, and he should have been prepared to file all claims by April 23, 1997, despite any uncertainty in the law. See, Order filed 3/24/97, United States District Court for the Norther District of California. In Rodrigues v. Calderon, C-96-1831-CW, the District Court equitably tolled the filing period twice, once before the petition was filed and then again after the petition had been filed. The District Court then went on to extend the second period of equitably tolling indefinitely to allow the court time to rule on the issue of exhaustion. See, Orders issued on

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No. C-94-2854-SBA, USDC-ND, Order filed 12/23/96; Mitcham v.Calderon, No. C-97-3825-VRW; USDC-ND; Order filed 11/5/97; Rodrigues v. Calderon, No. C-96-1831-CW, USDC-ND, Orders filed 3/24/97, 8/4/97, and 10/21/97; Walker v. Calderon, No. C-94-1997-SBA, USDC-ND, Order filed 4/30/97; Sheldon v. Calderon, No. CV-96-5545-TJH, USDC-Central District ["CD"], Orders filed 6/11/97, 8/26/97, and 11/12/97; Cain v. Calderon, No. CV-96-2584-ABC, USDC-CD, Order filed 4/14/97; Fudge v. Calderon, No. CV-95-5369-JGD, USDC-CD, Order filed 4/14/97; Cummings v. Calderon, No. CV-95-7118-CBM, USDC-CD, Order filed 4/17/97; Kirkpatrick v. Calderon, No. CV-96-0351-WDK, USDC-CD, Order filed 9/23/97.

3/24/97, 8/4/97, and 10/21/97, United States District Court for the Northern District of California.

The reason for the equitable tolling in Beeler's own case should not be considered "extraordinary" in a capital case under the strict standard established by the Ninth Circuit. The District Court found that one of the original counsel's desire to take other employment warranted a tolling of the filing period for seven months to allow new counsel time to become acquainted with the case. Substitutions of counsel, and counsel being busy with other matters, are not unheard of in capital case litigation.

Nor was the filing of a timely petition "impossible" in Beeler's case because of the substitution of counsel. One of Beeler's originally-appointed counsel, Karen Schryver, has continuously represented him throughout the habeas proceedings. While the overlapping period for the replacement of Beeler's other attorney might have made filing a petition somewhat more difficult, it was not impossible, especially where the District Court had earlier granted Beeler's request to file a "bare bones" petition without supporting points and authorities.

The Ninth Circuit's guideline for granting equitable tolling too easily allows for avoidable opportunities of delay. While substitution of counsel may be a circumstance beyond a prisoner's control, it is not a circumstance beyond appointed counsel or the District Court's control. Given the incentive for delay in death penalty cases (see, Lindh v. Murphy, 138 L. Ed. 2d at 497 [Rehnquist, C.J., dissenting]), and the delay that has developed in the habeas process, it cannot be unexpected that counsel will be replaced during the pendency of the proceedings.

Beeler has shown a general disregard for any limitation for filing his habeas claims, even though he has already filed his petition in the District Court. Beeler has

since indicated that should any of his claims be deemed unexhausted, he intends to request a stay of the proceedings in order to pursue exhaustion in the state court.[4] Beeler is thus seeking to further extend the time to introduce habeas claims in a way clearly not provided for by statute.

On the same day that he filed his Petition for Writ of Habeas Corpus in the District Court, Beeler also filed a successive habeas petition in the California State Supreme Court containing admittedly unexhausted claims. With his federal habeas petition, Beeler concurrently filed a motion to amend the petition, seeking advanced permission from the District Court to add more claims once the state court has resolved the claims in the successive petition before it. Although on November 12, 1997, the District Court denied Beeler's motion for future amendment of his habeas petition on the ground it was premature, it is plain that without an absolute deadline for filing a habeas petition with all claims, the floodgates are left wide open for the possibility of unlimited amendment, hence, unlimited delay, from the very beginning of the habeas process. See also, Rodrigues v. Calderon, C-96-1831-CW [similar stay and amendment requests filed by state inmate]. The result is the [illegible]ication of any meaningful period of limitation.

This Court has repeatedly noted:

> "[I]t is important, in order to preclude individualize enforcement of the Constitution in different parts of the Nation, to lay down as specifically as the nature of the problem permits the standard or directions that should govern the

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4. The issue of whether habeas proceedings can be held in abeyance pending exhaustion of remedies in the state courts is currently being litigated in the Ninth Circuit. Calderon v. District Court (Taylor), Court of Appeals Case No. 97-70567.

> District Judges in the disposition of applications of habeas corpus by prisoners under sentence of State Courts."

McCleskey v. Zant, 499 U.S. 467, 496, 111 S. Ct. 1454, 1467, 113 L. Ed. 2d 517 (1991), quoting, Brown v. Allen, 344 U.S. 443, 501-502, 73 S. Ct. 397, 437, 97 L. Ed. 469 (1953) (opinion of Frankfurter, J.); Lonchar v. Thomas, 116 S. Ct. at 1299.

A jurisdictional period of limitation is the specific standard that must be established in order to halt, from the very beginning of the process, the uncontrolled delay and abuse in federal collateral review.

B. The Language Of The AEDPA Reveals That Congress Intended The Period Of Limitation Be Jurisdictional In Nature

The language of the AEDPA demonstrates a clear intent that the period of limitation is a jurisdictional prerequisite and equitable tolling principles do not apply. Congress has plainly stated that a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Congress was precise in providing only one specified way of extending the one-year filing period: by not counting "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending" toward the one-year period of limitation. 28 U.S.C. § 2244(d)(2).

Congress was also precise in providing several fact-specific ways the period of limitation would begin to run, ensuring that a prisoner would have a fair full year to present his petition.[5] 28 U.S.C. § 2244(d)(1)(A)-(D).

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5. Congress was careful to insure that states would not prevent

The precision and detail of the language manifest congressional intent to preclude individual equitable considerations. Cf. United States v. Brockamp, ___ U.S. ___, 117 S. Ct. 849, 850-853, 136 L. Ed. 2d 818, 822 (1997) [highly detailed language shows no allowance for equitable tolling of filing time for tax refund claims]. Compared with the previous "amorphous standard" governing the time for filing a habeas petition. See, Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996), overruled on other grounds in Lindh v. Murphy, 117 S. Ct. 2059; accord, Arthur Calderon v. United States District Court (Beeler), 112 F.3d at 388, fn. 1; App. 3 at 131. The AEDPA is specific, precise, and highly detailed as it concerns the expeditious resolution of habeas matters, beginning with the filing period. Congress did not provide for any equitable considerations in enacting the period of limitation. The courts should not create authority for equitable considerations were none are provided for by Congress. Lonchar v. Thomas, 116 S. Ct. at 1300.

C. Congress Revealed Its Intent By Negative Implication

Congress's intent not to permit any kind of extension of the period of limitation is made obvious when Chapter 153 of Title 28 of United States Code is compared to Chapter 154, which was concurrently created by the Act. In Lindh v. Murphy, 117 S. Ct. 2059, this Court recognized that Congress had expressed its intent by means of negative implication arising out of the comparison of Chapters 153 and 154. The issue in Lindh was whether the requirements found in Chapter 153

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the timely filing of habeas petitions by providing that the one-year limitation period will not begin until any impediment to filing created by the state in violation of the Constitution or federal law is removed. 28 U.S.C. § 2244(d)(1)(B). States in return should not have to suffer further delay from events beyond and out of their control.

applied to pending cases. Chapter 154 contained the explicit provision created by section 107(c) of the Act, which provided: "Chapter 154. . . shall apply to cases pending on or after the date of enactment of this Act." This Court determined in Lindh that Chapter 153 did not apply to pending cases because that chapter lacked the section 107(c) provision found in Chapter 154:

> The insertion of § 107(c) with its different treatments of the two chapters thus illustrates the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted.

Lindh v. Murphy, 138 L.Ed 2d at 490.

This same analysis leads to the conclusion based on negative implication that Congress did not intend that the one-year limitation period be equitably tolled. In Chapter 154, particularly Title 28 of United States Code section 2263(b), Congress was precise in listing three specific events which would toll the 180-day period for filing the habeas petition. 28 U.S.C. § 2263(a) and (b). The first event listed was certiorari proceedings; the second was post-conviction direct or collateral review proceedings in the state court. 28 U.S.C. § 2263(b)(1) and (2). The third, found in Title 28 of United States Code section 2263(b)(3), is the only one which reflects permissible use of equitable considerations:

> The time requirements . . . shall be tolled --
> (3) during an additional period not to exceed 30 days, if -- [¶] (A) a motion for an extension of time is filed . . .; and [¶] (B) a

> showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

Emphasis added.

The maxim of statutory interpretation states: Expressio unius est exclusio alterius. Congress need not expressly reject inclusion of an exception in order to carry out the clear legislative mandate embodied in the AEDPA. Cf. United States v. Brockamp, 117 S. Ct. at 850-853. Congress was very explicit where equitable tolling was permitted in the habeas reform act. It refrained when none was permitted. By negative implication, as well as by the plain language establishing the period of limitation with only one stated exception, Congress has manifested its intent that the period of limitation be jurisdictional in nature, not subject to equitable tolling. Thus, judicial authority to equitably toll the period of limitation should not be read into the statute.

Prior to the Lindh decision, the Ninth Circuit rejected the use of negative implication to determine whether the one-year filing time was subject to equitable tolling. The Ninth Circuit noted, "[t]he Supreme Court has cautioned against using this kind of negative inferential reasoning. . . ." (App. 3 at 131.) However, this Court has since announced that Congress has in fact manifested its intent through negative implication for purposes of interpreting the AEDPA. Lindh v. Murphy, 138 L. Ed. 2d at 494. Under the reasoning found in Lindh, congressional intent to prohibit equitable tolling of the statutory filing time found in section 101 is revealed by negative implication.

D. The Competing Interests And Equities Have Already Been Balanced By Congress In Establishing The One-Year Period Of Limitation

A comparison of Chapters 153 and 154 also shows that in establishing different periods of limitations for filing the habeas application, Congress has already considered and balanced the interests for the parties involved. Hence, the courts need not, and indeed should not, impose upon the statute additional and impermissible equitable considerations.

Under Chapter 154, where a petitioner is guaranteed representation by state-appointed counsel, Congress has deemed 180 days to be sufficient time for filing the federal habeas application, with very limited equitable tolling permitted.[6] See, 28 U.S.C. § 2263(a) and (b). In contrast, for all cases, both capital and non-capital, which are controlled by Chapter 153, Congress has deemed one year to be sufficient time to file the habeas petition, whether or not a petitioner is represented by counsel.

In Lonchar v. Thomas, 116 S. Ct. 1293, this Court noted that habeas law history made clear that Congress had undertaken the balancing of interests with respect to the "prejudice" element of Federal Rules of Appellate Procedure, rule 9(a), on delayed petitions. Id., at 1300. This Court also noted that the courts should not undermine the balance "through the exercise of background equitable powers." Id. Thus, where Congress has already performed the balancing of the interests in enacting a law, the courts should not impose their

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6. It is significant that Congress allowed a maximum of only 30 additional days if the filing period were to be equitably tolled. 28 U.S.C. § 2263(b)(3). The seven-month extension of time granted by the District Court is clearly excessive, even if equitable tolling of the filing time were permitted in Chapter 153.

individualized weighing of equities on top of congressional decree.

In establishing the longer filing period for Chapter 153 cases, Congress has, from the beginning of the reform, considered and balanced the competing interest of the state in finalizing its judgments with the interest of the petitioner in seeking yet another opportunity for further review. See, Report of the United States Senate Committee on the Judiciary on S. 1763, S. Rep. No. 98-266, 9/12/83, pp. 3-18. The additional six months for filing the petition under Chapter 153 is obviously the built-in equitable time for filing to allow for the uncertainties attendant with unrepresented petitioners in a large variety of state criminal cases. Congress thus did not intend equitable considerations to further extend the filing period it had already thoughtfully established.[7/]

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7. Beeler received the windfall of the one-year time limit for filing his habeas petition. Beeler received not only the one-year time limit under Chapter 153 for filing but also two counsel appointed to represent him. Counsel were appointed on March 22, 1996, a month prior to the enactment of the AEDPA, and a year prior to what the District Court established as the initial filing date. During the transition period to replace counsel, Beeler was represented by three appointed counsel. Even with multiple attorneys appointed and the one-year time limit for filing the habeas petition, the District Court granted an extension of time, setting the filing date seven months beyond the March 25, 1997, filing date. Beeler still seeks to essentially extend the time for introducing new claims further by means of future amendment of the petition and stays of the proceedings.

CONCLUSION

Accordingly, this Court should issue a writ of certiorari and hold that the one-year time limit in section 101 of the AEDPA is a jurisdictional prerequisite to federal habeas corpus review.

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Respectfully submitted,

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